(26)

No. 463.

IN THE

Supreme Court of the United States

October Term, 1942.

ALEX RANIERI,
PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Citations

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petition for Rehearing.

Comes now the above named petitioner, Alex Ranieri, and presents this his petition for a rehearing, and, with leave of the Court, his reply brief filed herewith and made a part hereof, on his application for a writ of certiorari to review the judgment of the Court of Claims in the above entitled cause. Petitioner's application for such writ was denied on December 14, 1942.

Grounds for Rehearing.

1. This petition for a rehearing is filed under Rule 33 of this Court.

2. *Petitioner asks a rehearing because the Court did not have before it when considering the Petition an Abstract of the Daily Reports, which are the conclusive evidence on the issues, but too voluminous for examination by the Court. The Abstract was submitted below and its correctness unchallenged. An examination of it is essential to a correct or even an intelligent decision. It is annexed to the Reply Brief which was prepared and printed within a week of the filing of Respondent's brief, and is filed herewith.*

Defendant put in evidence *Exhibit 52 A-D,* its weekly written *Report* of each day's work, embracing a description of the soil, the reasons for the contractor's outfit being idle, remarks, and "any events of importance for each day". These reports are conclusive evidence on all the many matters connected with the progress of the work (Reply Brf. p. 13). By stipulation, this voluminous Exhibit was not printed but was made a part of the Record herein (R. 56-58), and has not been examined by the Court.

This whole case revolves about the condition of the soil:

Respondent agreed to furnish the soil (R. 16; Ptn. p. 3), and thereby became subject to an implied warranty to furnish fit soil (*infra* p. 10, Note 2), (in addition to its agreement hereinafter described,—that the soil "should be free of all foreign matter, with no tendency to slough and of the best grade", hereinafter called "*Best Grade*", *Id.*) If it failed to furnish fit soil, it became liable for the damages suffered, and these *Reports* are of superlative importance because Respondent thereby proved beyond dispute that it utterly failed to furnish fit soil, as an examination of the abstract of these *Reports* will show.

The *Reports* prove, (besides other harmful results), that, *through the unfit condition of the soil,* petitioner lost the most of 160 days, (half the time he worked), and parts of every day.

Yet the Court below found that this soil was "Satisfactory". While these Reports are conclusive and cannot be contradicted, Respondent attempted this on the testimony of witnesses, but they not only agree with the Reports that the soil was unfit but show that it was pervaded with cypress stumps and foreign matter, making the work more difficult and taking more time (Reply Brf. ps. 2-5). The conclusion is also in conflict with the Court's own evidentiary findings, and with 107 notices that the soil was unfit served by Respondent on petitioner. (*Id.*)

Next the Court below, ignoring petitioner's loss of half his time through the unfit condition of the soil, found what plainly was impossible,—that but for his own fault petitioner could have completed in time, (R. 37).

These Reports conclusively show that the Court erred in its findings and refusal to find, as stated in the Petition and Reply Brief and herein.

3. The decision below is not alone in conflict with the landmark decisions of this Court, but even more important with the general intent of Congress to set up jurisdiction in the Court of Claims and this Court which would insure the payment of just claims against the Government, and specifically that this should be accomplished through a fair trial in a Court established for that purpose. Here, petitioner was led to bid 12.40 cents per cu. yd. for work, the fair value of which was 20 cents (as Respondent proved Pt'n. p. 6, note 18), through Respondents misrepresentations and concealments, resulting in Petitioner's ruin, and

he was then led into a litigation which has lasted eight years, with the following unjustifiable results,—

The Court below,—

(a) Refused to make findings of controlling facts entitling petitioner to recover, based on Respondent's conclusive evidence, (Pt'n. pp. 12-17) and

(b) Made findings also on controlling questions both without any evidence and in conflict with Respondent's conclusive evidence, (Pt'n. p. 12; Reply Brf. pp. 2-23), and

(c) Made ultimate findings in conflict with its evidentiary findings (Pt'n. pp. 10-12, 15-17).

(d) In addition, the construction of a vital provision of the Government standard form of construction contract was involved, delay in construing which will be disastrous to contractors and harmful to the Government.

4. The following issues raised by petitioner are not answered by Respondent,—[1].

NOTE 1.

Respondent refused to pay petitioner money due which it had no right to hold and of which petitioner was in dire need (Ptn. 16, 17); petitioner had valid grounds to rescind and rescinded, and Respondent served written objections, none of them valid, whereby recission became effective (*Id.* p. 17); Respondent proved that there were cypress trees the entire length of the pits (*Id.* p. 4, note 6; R. 53, 55, 56), necessitating going further out or digging deeper for material (Ptn. p. 5, note 12), involving 30 to 40% loss of time (*Id.* note 11), and requiring about a dozen machines instead of the three approved previous to the work (Def's. Exs. 52 A-D, and 18; R. 36; Ptn. p. 5, notes 9, 13), yet Respondent refused to pay the increased cost (Ptn. p. 16, R. 11); that,—

Respondent is estopped through having claimed through the progress of the work (Def's. Ex. 52 A-D), and in its answer that the soil was "totally unfit" (R. 10) from now claiming (with no evidence and in conflict with its Daily Reports, and the 107 notices it gave petitioner), that there was "satisfactory" soil, (a word of most uncertain meaning, but Respondent clearly recognized that the evidence prohibited use of the customary word,—"fit"), and from adopting the alleged duty to "select" it, never discovered by Respondent until after the decision below, (Ptn. p. 6, note 21, and p. 15); and that,—

Respondent is not entitled to its counterclaim as the agreement to furnish "Best Grade" soil, (*Id.* p. 3, notes 2, 3 and 4), and the implied warranty that the soil would be fit, were both conditions precedent and neither was performed by Respondent, (Ptn. ps. 14, 17-19).

5. Respondent presented Petitioner a soil chart which it proved was made from borings which were utterly inadequate, (Reply Brf. ps. 6, 7). It also approved petitioner's plant and plan of work, which was sufficient to handle fit soil and much more "Best Grade" soil, (but not the sloughy soil pervaded with cypress trees and foreign matter encountered), which

> "* * * was an assurance * * * to the company" (petitioner) "of the truth of the representation, and a justification of reliance upon it" (U. S. v. Atlantic Dredging Co., 253 U. S. 1, 11, 12.

This was a deception entitling petitioner to rescind, (*Id*), yet, (although because of slides, adequate new borings, soil analysis, and stabilization computations became necessary to determine whether, the levee could be built with the available material), (R. 52) the Court refused to find these facts, Respondent makes no defense of its presenting inadequate borings and this Court holds that this alone was a deception, (intensified by approval of petitioner's plant and plan of work) entitling petitioner to rescind. (U. S. v. Atlantic Dredging Co., 253 U. S. 1, 11, 12).

The borings chart showed that the only defect in the condition of the soil was that 10% was soft clay, but Respondent's conclusive proof was that the soil was all wet and sloughy (Def's. Ex. 52 A-D; Appendix Reply Brf.) permeated with "cypress stumps and other organic matter, (R. 55, 56, 53) which caused damage to his" (petitioner's) "machinery", and "he" (petitioner) "also had difficulty with sloughs and slides", (Opinion, R. 39), yet the Court found that the borings were not inaccurately charted (R. 32), and that Respondent's officers did not misrepresent conditions (R. 37).

The inadequate borings and approval of the plan of work and machinery, and concealments and misrepresentations in the chart, induced petitioner to bid 12.40 cents per cubic yard for the work which Respondent proved was worth 20 cents (Pt'n. p. 6, Note 18).

Respondent contends, on the testimony of one expert witness, (in conflict with its own documentary evidence, the borings chart, and the Daily Reports, and therefore incompetent) that the soil was "satisfactory". This testimony is examined in the Reply Brief, (ps. 2-5). All of the witnesses cited, including Respondent's officer in charge, testified that the soil was "unfit". Respondent's claims that showing the names of the soil was sufficient without stating their condition, but this Court held that describing soil as sand and gravel without stating that they were cemented together entitled the contractors to recover the extra expense of excavating (Christie v. U. S., 237 U. S. 234).

Respondent admits that there should have been a finding, (as the Court below did find, in its opinion, R. 39), that there were cypress trees (Rspds. Brf. p. 10). That they impeded the machinery and greatly slowed down the work, 30 to 40% is undisputed (R. 44). They were not shown in the chart (Def's. Ex. 16).

Heusmann, Respondent's expert, says that the organic content must have been high (R. 56). The misrepresentations and concealments in the borings chart entitled petitioner to rescind and recover (Pt'n. pp. 14, 15).

(6). Respondent's agreement to furnish the soil, and its provision that it must be of the kind described in Article 7 (R. 24) and Sec. 22-a, (R. 17) (the "Best Grade"

soil), resulted in a holding by the Court below that these two provisions placed an obligation on petitioner to select "satisfactory" soil (R. 40, 41).

This theory originated with the Court below, Respondent's contention throughout the progress of the work (Def's Ex. 52 A-D.; Appendix Reply Brf.), in its answer and on the trial having been that all the soil was "totally unfit", (R. 8-10; 32), and that Respondent was obliged to dry it and make it fit (P'tn. Note 21, p. 6), but petitioner could not select "satisfactory" soil from earth which was all so bad that it caused a loss of most of the first 160 days, and a loss of time every day; which was all so wet that pumps had to be operated continuously (Def's Ex. 52 A-D); and was all so unfit that second borings had to be made to determine whether it was physically possible to build the levee with it (R. 52). There is no evidence that the soil was mixed, part good and part bad, but all the evidence is that all the soil was bad (Pt'n. p. 4, Note 6).

Respondent does not support its present contention that the obligation to select "Best Grade" soil was that of petitioner by any decision or textbook authority. There is no such authority, and the contention is in conflict with the existing authorities, to wit,—Philadelphia Etc. R. R. Co. v. Howard, 13 How. 307 and McPherson v. San Joaquin, 124 Cal. xvii 56 p. 801 (Reply Brf. p. 18).

Moreover, generally speaking one in the position of a buyer as is petitioner is not obliged to select his material from a mass, which is peculiarly true here where the material was hidden underground, and so wet that pumps had to be operated continuously (Id. p. 17); (Norrington v. Wright, 115 U. S. 188).

Respondent's contention here that these two provisions placed no obligation on Respondent but wholly on petitioner emphasizes the vital importance of an authoritative construction of them by this Court for, until it is made, many contractors will fear such an interpretation as Respondent urges and bid an unjustifiably high price, even where there is an abundance of "Best Grade" soil, and contractors who rely upon such provisions as a warranty or condition precedent of the Government will, where the soil is as bad as it was here, be ruined through bids at a fraction of the value of the work (Reply Brf. p. 19).

7. The evidentiary findings of the Court below were in conflict with its ultimate finding:

The Court found the soil was wet and sloughy (R. 32, 33), and that the machinery which Respondent had approved was wholly insufficient and that the bad conditions required large additions thereto (R. 36); and that "any sort of investigation * * * would have shown * * *" "that he" (Petitioner) "would probably encounter wet soil, that it is not unusual to encounter cypress stumps; and that such stumps are frequently found in that section * * *" *(Id.* 41); and that "plaintiff ran into many difficulties in handling the soil * * *, encountering cypress stumps and other organic matter, which caused damage to his machinery. He also had difficulty with sloughs and slides". (Opinion, R. 39).

It is impossible to reconcile these findings with the conclusion that the soil was "satisfactory". To whom was it satisfactory? Certainly not to Respondent; it spent all the time the work was being done in preparing the Daily Reports, showing the unfit condition of the soil and in

compiling from them and presenting 107 notices that it was wet and unfit and interposed an answer that it was mostly "totally unfit". (R. 33, 10.) And no one could think that it was "satisfactory" to petitioner who lost half the time he worked through its destructively bad condition and was ruined and forced into bankruptcy by it. It was "satisfactory" to neither of the parties of the contract,—the only ones interested and to be satisfied.

Moreover the contract provides that soil of the kind Respondent provided,—wet and sloughy and pervaded with foreign matter including cypress trees, could not be used (R. 24, 17, 18), and therefore it could not be satisfactory.

Petitioner was entitled to the contrary finding,—just as Respondent pleaded and proved,—that the soil was "totally unfit" (R. 10, Def's. Ex. 52 A-D, Appendix Reply Brf.), and the "judgment in point of law is not sustainable". (U. S. v. Esnault-Pelterie, 300 U. S. 26, 31.)

Respondent's failure to furnish fit soil is emphasized and made even more clear than through its Daily Reports (Appendix, Reply Brf.) by the two circumstances, —that the officer in charge knew that there were cypress stumps (R. 53), and the new contractor received 18.60,— 50% more than petitioner through misrepresentations was induced to bid, and took 50% more than the time limit fixed by his contract. (R. 51, 56; Reply Brf. p. 5.)

8. *Respondent throughout petitioner's work arbitrarily ignored its agreement to furnish "Best Grade" soil, and its implied obligation to furnish fit soil and through duress required petitioner to accept "totally unfit" soil, and on 107 occasions by harassing notices sought to impose on him*

the task of putting such "totally unfit" soil into suitable condition (R. 32, 33,) which entitled and forced petitioner to abandon the contract and recover the value of his work.

Petitioner was entitled to recover because,—

(a) Respondent's officer in charge maintained throughout the progress of the work an arbitrary and unjustifiable position in requiring petitioner to accept unfit soil, and make it fit, despite petitioner's repeated appeals and protests to him and requests to shut down[1]. (R. 45, 48, 49; Plf's. Ex. 37), whereas petitioner's sole obligation was to take the soil from the pits and place it on the levee in the ordinary manner[2].

NOTE 1.

"The contention" (that the contractor was bound by certain contract provisions) "overlooks the view of the contract entertained by Colonel Lydecker, and the uselessness of soliciting or expecting any change by him. His conduct, to use counsel's description, 'though perhaps without malice or bad faith in the tortious sense' was repellent of appeal or of any alternative but submission with its consequences. And, we think, against the explicit declaration of the contract of the material to be excavated and its price." U. S. v. Smith, 256 U. S. 11, 16.

[2] "Where goods or machinery are ordered for a particular use to the knowledge of the manufacturer or vendor, there is an implied undertaking or warranty on his part that they will be fit for such use in the ordinary manner, * * *." Bentley v. State, 73 Wis. 416, 41 N. W. 338, approved in Spearin v. U. S., 248 U. S. 132, 137.

"As to the claim for $750, the 'special castings' were to be supplied by the defendant, * * * the castings, when furnished * * * were defective in size; and expense and delay ensued in remedying the defects, causing a damage to the plaintiffs, as alleged, of $750. The defendant contends that the clause * * * that the plaintiffs 'shall have no claim upon the city for any delay in the delivery of * * * materials * * * throws the loss * * * on the plaintiffs. But we do not so think. * * *.' The size of the valve boxes is not mentioned in the contract, nor their costs. They were, therefore, to be of the usual size and cost. The trustees afterwards required the valve boxes to be of a size which made them cost $3 more each than those of the usual size would have cost. This was a change of plan, and the increased work caused by it is agreed to be paid for, but there is no contract rate for the work of the class. The item of $447 seems to be recoverable." Wood v. Fort Wayne, 119 U. S. 312.

See also McPherson v. San Joaquin Co., 124 Cal. xvii, 56 P. 802; 13 C. J. § 522, p. 460; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108; Board of Directors v. Roach, 174 F. 949, 953; Cotton Co. v. U. S., 87 Ct. Cls. 563.

(b) The compelling petitioner to attempt to make the unfit material fit

> "was an exercise of superintendence and unwarrantable superintendence." (U. S. v. Barlow, 184 U. S. 123.)

(c) The conduct of the officer in charge in ignoring and persistently misconstruing Respondent's obligation to furnish fit soil, and mistakenly insisting that petitioner was bound to make the bad soil fit, amounted to duress:

> "We cannot ignore the suggestion of duress there was in the situation, or the questionable fairness of the conduct of the government, aside from the illegality of the construction of the contract insisted on, * * *." (Freund v. U. S., 260 U. S. 60, 70.)

9. *There is no real dispute concerning questions of fact herein, but only questions of law in construing the contract and specifications, and, therefore, no appeal was necessary under Article 15, or otherwise, in the contract.* (See Reply Brf. ps. 21, 22.)

As shown above, there was no finding of fact made by the contracting officer that there was fit or "Best Grade" soil, despite petitioner's repeated protests and appeals, but all the evidence shows that the soil was unfit, sloughy, with hidden cypress trees and foreign matter (Def's Ex. 52 A-D; Ptn. p. 4, Note 6; Reply Brf. ps. 2-5). So there was no dispute as to the above facts, but only the questions of law in construing Article 7 of the contract (R. 24), and Sec. 22-a of the Specifications (R. 17),—whether respondent in agreeing to furnish the soil breached the contract in violation of the above provisions in furnishing unfit soil, or its implied warranty to furnish fit soil. The decisions upon questions of law are reviewable by the Court. U. S. v. Laughlin, 249 U. S. 440, 443; Dismirke v. U. S., 297 U. S. 167; U. S. v. Compagnie Gen. Tran., 26 F. 2d 195, 198.

For all the foregoing reasons, including those set forth in the Petition and Reply Brief, petitioner urges that this Petition for a Rehearing, and Writ of Certiorari, be granted.

Respectfully submitted,

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Certificate of Counsel.

S. Wallace Dempsey, counsel for the above named petitioner, does hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

S. WALLACE DEMPSEY,
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